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No. 95-135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WERNER H. ERHARD,

Petitioner,

-against-

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Respondent argues that this case is not appropriate for the grant of certiorari because the Tax Court judge's review of the special trial judge's report was sufficient to satisfy the requirement of I.R.C. § 7443A(b)(4) that the Tax Court judge, and not the special trial judge, actually decide the case. Because the grounds upon which respondent relies have been raised for the first time by respondent's brief, petitioner submits this reply in further support of his petition for certiorari. This case is appropriate for the grant of certiorari because petitioner has asked this Court to consider a question which it specifically declined to answer in *Freytag v. Commissioner*, 501 U.S. 868 (1991). That question is whether the "deferential

standard with which Tax Court Rule 183 requires a Tax Court judge to review the factual findings of a special trial judge allows the latter not only to hear a case but effectively to resolve it." 501 U.S. at 874 n.3. The issue left unanswered in *Freytag* is squarely raised in this case.

I. Failure of the Supreme Court to Consider This Issue Now Will Inevitably Result in Uncertainty in Cases Referred to Special Trial Judges in the Tax Court.

There are currently no conflicting circuit court decisions on the question of whether the deferential standard of review set forth in Tax Court Rule 183 is sufficient to satisfy the requirement of I.R.C. § 7443A(b)(4) that the decision of the Tax Court be rendered by a Tax Court judge and not by a special trial judge. Respondent states that the Tax Court's interpretation of "due regard" requires a less deferential standard of review than "clearly erroneous" (Resp. Obj. 7). However, the District of Columbia Circuit has held that the "due regard" standard set forth in Tax Court Rule 183 is synonymous with a "clearly erroneous" standard of review. *Stone v. Commissioner*, 865 F.2d 342 (D.C. Cir. 1989), *rev'g sub nom. Rosenbaum v. Commissioner*, 45 T.C.M. (CCH) 825, 827 (1983). The Ninth Circuit below similarly stated: "the tax court judge . . . must presume that the special trial judge's findings of fact are correct." Appendix 16a. Accordingly, the Court should grant certiorari in this case now before further uncertainty arises in the standard to be applied by Tax Court judges in reviewing special trial judges' reports. "[T]he time to put on the roof is before it starts raining." *Carolina Environmental Study Group, Inc. v. United States Atomic Energy Comm.*, 431 F. Supp. 203, 226 (W.D.N.C. 1977), *rev'd on other grounds*, 438 U.S. 59 (1978).

II. Tax Court Rule 183 Fails to Provide for the Meaningful Review Required by I.R.C. § 7443A.

Every case assigned to a special trial judge raises the issue of whether Tax Court Rule 183 is consistent with the authorizing statute, I.R.C. § 7443A(b)(4). Tax Court Rule 183 prevents a Tax Court judge from conducting a meaningful review because it requires the Tax Court judge to give "due regard" to a special trial judge's factual findings. As the D.C. Circuit in *Stone* held, due regard is synonymous with a clearly erroneous standard of review. *Stone, supra,* at 346. The circuit court interpretation is consistent with the general standard of review of findings made by a subordinate judicial officer who hears testimony and decides disputed issues of fact. *See* Fed. R. Civ. P. 52(a) and 53(e) (review of master's findings under clearly erroneous standard).[1] The due regard that a Tax Court judge gives to a special trial judge's findings precludes the judge from deciding the case, violating I.R.C. § 7443A and the principles of *Freytag*.

Respondent asserts that the Tax Court has an "inherent right" to make reasonable rules regarding the hearing and determination of cases before it, and refers to a list of "opportunities" and proceedings in the Tax Court as proof that there was no "rubber stamp activity" on the part of the Tax Court judge (Resp. Obj. 10-11). Respondent's argument is incorrect and beside the point. The "inherent right" of the Tax Court to make reasonable rules does not give the Tax Court the right to delegate decision-making to special trial judges. The issue raised in this petition is whether the judge's deferen-

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[1]The clearly erroneous review of a master's findings is based on Former Federal Equity Rule 60-1/2, which provided that "the report of the master shall be treated as presumptively correct." Notes of Advisory Committee on Rules, Note to Subdivision (e) (standard for district court review of master's findings "contains in substance the former equity procedure for the review of a master's report").

tial standard of review of the special trial judge's findings is consistent with I.R.C. § 7443A and *Freytag*. None of the "opportunities" (*e.g.*, post-trial briefs submitted to the special trial judge or the filing of a motion for reconsideration) that respondent claims were available to petitioner cures this defect in Tax Court procedure.[2] The Tax Court rules' requirement that due regard be given to a special trial judge's report and the absence of an opportunity for parties to file objections to the spcial trial judge's report eliminates the opportunity for any meaningful review of a special trial judge's factual findings. Therefore, the procedures that Judge Scott and all other Tax Court judges follow do not comply with *Freytag* and the statutory mandate.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

October 4, 1995

Respectfully submitted,

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[2]Judge Scott actually complained that petitioner's motion for reconsideration asked Judge Scott to reconsider the special trial judge's factual determinations. 64 T.C.M. (CCH) 1011 (1992).